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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KAREN LIVADAS,
Petitioner,
v.
LLOYD W. AUBRY, JR., LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTERESTS OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 220,000 companies and several thousand other organizations, including over 19,000 corporations, partnerships, proprietorships, and trade and professional associations in the State of California. A significant as-

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of Court.

pect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[2]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of approximately 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with more than 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these Councils provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. The NAM actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts,[3] the United States Con-

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[2] *See, e.g., ABF Freight Syst., Inc. v. NLRB,* —— U.S. ——, 114 S.Ct. 835 (1994); *Building and Constr. Trades Council of Metro. Dist. v. Assoc. Builders and Contractors of Mass./R.I., Inc.,* —— U.S. ——, 113 S.Ct. 1190 (1993); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991); *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27 (1987); *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985); *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978); *NLRB v. Burns Int'l Sec. Servs.,* 406 U.S. 272 (1972).

[3] *See, e.g., General Motors Corp. v. Romein,* —— U.S. ——, 112 S.Ct. 1105 (1992); *Teamsters v. Daniel,* 439 U.S. 551 (1979); *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974).

gress, the Executive Branch and independent regulatory agencies of the federal government.

This case presents the issue of whether a state infringes the right of employees to bargain collectively under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, ("NLRA" or "the Act") when it adopts a policy of non-interference toward disputes between parties to collectively bargained agreements which provide for arbitration, when to intervene would require the state to interpret or apply the agreement. The case raises the further issue of whether an individual may maintain a claim against the state under 42 U.S.C. § 1983, ("Section 1983") merely by alleging that the federal law at issue pre-empts a state's action when there has been little or no showing that federal rights have been infringed.

These issues are of vital concern to both the Chamber and the NAM and to their respective constituents, many of whom have collective bargaining agreements with unions. Virtually all of these agreements have been negotiated against the backdrop of state laws and regulations that foster the principle of free collective bargaining by excepting from regulation disputes between parties to collectively bargained agreements. A resolution that would broadly prohibit state regulations that seek to foster free collective bargaining would have numerous ill effects. It would disrupt the balance struck by the parties through negotiation by importing into their collectively bargained contracts an inestimable number of statutorily mandated terms. It also would burden the states with newly created enforcement obligations not contemplated by state legislators. Finally, and importantly, such an outcome would create incentives for legislated, rather than negotiated, collective bargaining agreements, a result that is inconsistent with the fundamental goal of the NLRA: free collective bargaining.

The Chamber and the NAM believe that federal labor law is complemented, not undermined, by a state's respect

for the balance struck in collectively bargained relationships. Accordingly, we submit this brief *amici curiae* to urge that the Court reject Livadas' challenge to Section 229 as interpreted by the California Commissioner of Labor and to uphold the Ninth Circuit's Order to the District Court directing entry of judgment in favor of the Commissioner.

SUMMARY OF THE CASE

Karen Livadas, a grocery clerk, was employed in Napa County, California by Safeway Stores. Livadas was a member of Local 373, United Food and Commercial Workers, AFL-CIO ("Local 373" or "the Union"), and the terms of her employment were governed by a collective bargaining agreement between Safeway and the Union. The agreement provides for the arbitration of unresolved grievances filed by the Union and, in certain instances, for an expedited arbitration procedure.

Livadas was suspended by Safeway on December 27, 1989, and was discharged on January 2, 1990. At the time of her discharge, Livadas requested that she be paid the wages due her. Safeway's store manager denied the request because Livadas' payroll records were not at the store. Three days later, on January 5, Livadas received a check for all of the wages that were due her as of January 2, 1990.

On January 9, 1990, Livadas filed a claim with the California Division of Labor Standards Enforcement ("DLSE") asserting that under the California Labor Code she was entitled to a penalty equivalent to three days' wages because she was not paid in full on January 2 when she was discharged. Sections 201 and 203 of the California Labor Code stipulate that discharged employees be paid in full at the time of their discharge and provide, as a penalty for non-compliance, that the wages of discharged employees continue to accrue until paid. On February 7, 1990, the DLSE notified Livadas

that it could not process her claim, stating that she was covered by a collective bargaining agreement; that Section 229 of the California Labor Code precluded it from adjudicating "any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause;" and that a determination of Livadas' wage rate, which was essential to the prosecution of her claim, would require the application of the collective bargaining agreement.

On February 16, 1990, Livadas brought suit in the United States District Court, under 42 U.S.C. § 1983,[4] alleging that the California Labor Commissioner's interpretation of Section 229 and his enforcement policy thereunder violated her right under NLRA Section 7 to bargain collectively. Livadas sought injunctive and declaratory relief, and damages predicated on the DLSE's refusal to pursue her penalty claim. The District Court granted Livadas' motion for summary judgment, ruling that 42 U.S.C. § 1983 provided Livadas with a cause of action and that the DLSE's policy and action deprived Livadas of her right to bargain collectively within the meaning of the National Labor Relations Act. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the District Court. A Court panel agreed that Livadas had a Section 1983 cause of action, but the panel majority concluded that Livadas had failed to establish that the DLSE had deprived her of her right to bargain collectively under the National Labor Relations Act. *Livadas v. Aubry*, 987 F.2d 552, 560 (9th Cir. 1993), *cert. granted*, 114 S.Ct. 907 (1994).

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[4] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

At the time that Livadas brought her suit in the District Court, Local 373 simultaneously was pursuing a grievance on her behalf. The grievance was pressed under the expedited arbitration procedures of the Safeway-Local 373 collective bargaining agreement, and on July 11, 1990, prior to the date on which the District Court granted Livadas' summary judgment motion, the Arbitrator determined that Livadas' discharge violated the terms of the collective bargaining agreement. Accordingly, Livadas was awarded reinstatement and full back pay with interest from the date of her suspension on December 27, 1989 with only minor deductions.[5]

SUMMARY OF THE ARGUMENT

I. The Commissioner of Labor's interpretation of California Labor Code Section 229 does not interfere with, restrain or deny California's citizens the right to bargain collectively, but, rather, leaves the parties free to fashion, without State interference, "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). By allowing employers and employee representatives to bargain for the rights and obligations that are most valuable to their constituents, and by allowing them to agree upon arbitration as the method for resolving their disputes, California's enforcement policy accords with the fundamental principles of our Nation's labor laws that foster free collective bargaining while leaving the particular substantive terms of the agreement to the parties. Indeed, Livadas' reinstatement with back-pay, which was secured through the grievance and arbitration provisions of her collective bargaining agreement, demonstrates the efficacy of both the federal and State policies that accord deference to collectively bargained relationships.

[5] The record before this Court omits mention of the arbitration proceeding. The Arbitrator's decision and the underlying grievance are reproduced in the Appendix hereto.

Section 229 as interpreted does not subject employees who exercise their Section 7 rights to discriminatory treatment or penalize the exercise of those rights. That employees covered by collective bargaining agreements do not share the precise statutory benefits and burdens as do non-represented employees is a recognized incident of bargaining and is not discriminatory. Both Congress, in enacting legislation containing exceptions for collectively bargained agreements, and unions, in exercising their latitude during bargaining to waive certain individual rights of their members, have demonstrated their understanding and acceptance of this incident of "collective" action. Further, the Commissioner's policy under Section 229 does not preclude the enforcement of all claims of union-represented employees, for the Section's criteria only bars adjudication of claims involving the interpretation or application of collective bargaining agreements containing an arbitration clause. Conversely, various employee groups that are not subject to the jurisdiction of the National Labor Relations Board—and thus not protected by NLRA Section 7—also are covered by collective bargaining agreements containing an arbitration clause, and therefore also are precluded from pursuing claims pursuant to California's enforcement policy. In sum, California's enforcement policy does not discriminate based upon the exercise of Section 7 rights and does not uniquely burden those federal rights.

II. The mere assertion of a federal right and an allegation of state interference, without more, does not entitle an individual to compel a state to defend a federal lawsuit brought under 42 U.S.C. § 1983. Rather, "the question still remains whether [the] claim . . . comes within the scope of the right that Congress intended to confer." *Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 433-34 (O'Connor J., dissenting).

An extra measure of caution is warranted in inferring Congressional intent to confer an actionable right on individuals against states when, as here, "the rights asserted

impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on States." *Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981). Indeed, such prudence is particularly appropriate given that the core concern of preemption is "the federal structure of the Nation, rather than the securing of rights, privileges and immunities to individuals." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989) ("*Golden State II.*") (Kennedy, J., dissenting).

Since there is no plausible nexus between the Commissioner's interpretation of Section 229—which resulted in the California Department of Labor's decision not to proceed with Livadas' penalty claim—and Livadas' claim of interference with her federal right to bargain collectively, a cause of action under Section 1983 simply does not lie. Livadas' claim of a violation of her Section 7 right to bargain collectively is too "vague and amorphous" to be enforceable.

III. Many states have laws that contain exceptions for employees covered by collective bargaining agreements—laws that have provided a backdrop against which unions and employers have bargained contracts for almost sixty years. These laws generally presume that employees who exercise their Section 7 rights will be fairly represented at the bargaining table by unions that will obtain for the represented employees terms and conditions in excess of statutorily mandated minimums and that these terms will be secured through grievance and arbitration agreements.

This system and the delicate balance that collective bargaining represents may be jeopardized by a sweeping judicial pronouncement that states may no longer presume that unionized employees will win more at the bargaining table than non-union employees, or that the bargains they have struck will be secured through grievance and arbitration agreements. A broad new application of state employment laws to parties to collectively bargained

agreements could well impose upon those parties terms that may have been expressly negotiated away for other more valuable rights.

When unions or employers perceive themselves as better able to secure gains by their conduct away from the bargaining table, whether by way of their political power or by their litigation resources, the concept of free collective bargaining upon which the National Labor Relations Act is based is substantially eroded. It is precisely because the NLRA seeks to further "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract[]" (*H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970)) that deference to collectively bargained agreements should not be rejected based upon an attenuated claim of harm of the sort asserted by Livadas.

ARGUMENT

I. LIVADAS' SECTION 7 RIGHTS HAVE NOT BEEN IMPINGED UPON BY THE STATE OF CALIFORNIA.

This Court, in an early case interpreting the preemptive effect of the National Labor Relations Act on state legislation, observed: "[w]e deal . . . not with the theoretical disputes but with concrete and specific issues raised by actual cases." *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 739, 746 (1942). Expounding on this theme, Justice Frankfurter later stressed the necessity of analyzing the claim of harm to NLRA rights in relation to the concrete action of the state:

> It is . . . clear that the boundaries within which a State may act are determined by the terrain and not by abstract projection. . . . The adjustment thus called for between State and National interests is not attained by reliance on uncritical generalities or

rhetorical phrases unnourished by the particularities of specific situations.

Amalgamated Assoc. of Street, Elec., Ry. and Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U.S. 383, 403 (1951) (Frankfurter, J., dissenting).

In this case, Livadas' claim rests upon the premise that the Commissioner's interpretation of California's statute has interfered with her federal right to bargain collectively under NLRA Section 7. Yet, rather than providing a concrete analysis of how California's action limited, prevented or hindered bargaining in her case, Livadas and her supporting *amici* make expansive claims of harm to Livadas' Section 7 right that are in no way "determined by the terrain" of this case, but instead, are based upon "abstract projections" and "uncritical generalities."

Far from interfering with, restraining or denying California's citizens the right to bargain collectively, the Commissioner's interpretation of California Labor Code Section 229 leaves the parties free to fashion, without state interference, "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). *See also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) ("*Golden State I*"); *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 551 (1979); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959). Indeed, California's policy accords with the fundamental predicate of our nation's labor laws of fostering an equitable process for bargaining without interfering with "particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985). Moreover, as we show below, the Commissioner's policy of refraining from taking action that will, more likely than not, conflict with the

collectively bargained agreement's terms and thereby impede the process of arbitration, further accords with the federal scheme.[6]

A. Section 229 As Interpreted Accords With The Federal Policy Articulated In The NLRA Of Honoring The Right Of The Parties To Bargain Collectively.

Consistent with its concern for ensuring fairness in the process of bargaining rather than for mandating a particular final product, Congress, in enacting the NLRA, left intact the states' "traditional[] . . . latitude under their police powers to legislate as to the protection of the lives, health and comfort, and quiet of" their citizens. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 756, *quoting, Slaughter-House Cases*, 16 Wall 36, 62 (1873) *and Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1855) (internal quotations omitted). Accordingly, this Court has sanctioned certain state laws that have the effect of imposing terms on parties to the collective bargaining process through mandatory minimum labor standards. *See, e.g., Metropolitan Life, supra*; *Malone v. White Motor Corp.*, 435 U.S. 497, 514 (1978). Similarly, federal labor policy is not offended by a state's decision not to interfere where parties have, by negotiation, created their own code to regulate the terms and conditions of employment. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Indeed, as this Court ob-

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[6] This case does not require answering the question of whether a state may create a so-called "minimum standard" enforcement policy of a wage statute aimed at the protection of non-represented employees, although it seems clear that a state, in the exercise of its police powers, may do so. Nor need the Court determine whether or not California *would be* pre-empted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, *if* it applied its statutory scheme to employees with collective bargaining agreements containing an arbitration clause. Certainly, the Court need not—and the Chamber and NAM respectfully submit, ought not—accept the AFL-CIO's invitation to reconsider the scope of Section 301 pre-emption.

served in *Fort Halifax*, "[i]f a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption . . . surely one that permits such bargaining cannot be pre-empted." *Id.* at 22 (emphasis in original).

We submit that Section 229 *encourages* parties to bargain and accords appropriate deference to the product of their bargaining where provision is made for the arbitration of their disputes. This is consonant with first principles of federal labor policy, articulated in the *Steelworkers Trilogy*, favoring the creation of a "generalized code" to govern the workplace and deferring to the resolution of industrial disputes through the grievance-arbitration provisions of collective bargaining agreements. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). California's policy quite appropriately avoids entanglement with both the bargaining process and its end result and presents no direct conflict with the federal right to bargain collectively.

B. Section 229 And The California Labor Commissioner's Enforcement Policy Derived From That Statute Neither Discriminated Against Livadas Nor Interfered With Her Right To Bargain Collectively.

Notwithstanding the contrary arguments of Livadas and her supporting *amici*, Section 229 as interpreted does not in any way subject employees who exercise their Section 7 rights to discriminatory treatment or penalize the exercise of those rights. First, and as a general matter, the mere fact that employees who are covered by collective bargaining agreements do not share the precise set of statutory benefits and burdens as do other individuals who have chosen not to enter into such contracts is not, in and of itself, discriminatory. As demonstrated in the brief *amici curiae* for the Employers Group *et al.*, many federal statutes setting minimum labor standards provide exceptions

for employees covered by collective bargaining agreements, including the federal Fair Labor Standards Act and the Service Contract Act (See Brief *Amici Curiae* for the Employers Group, *et al.* in Support of Respondent, pp. 25-26). Similarly, it has long been recognized that employees ought to be allowed to pursue collectively, through the bargaining process, the set of protections most advantageous to them, and that, to effectuate this goal, unions are empowered in many cases to "waive [individual] member's statutorily protected rights." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983).[7] In both contexts, employees may "lose" certain protections enjoyed by other individuals "because" they have exercised their Section 7 right to bargain collectively. In neither case, however, have employees been subject to discrimination because they have exercised Section 7 rights. It is clear, in light of this general scheme, that a state may adopt a "hands off" policy for parties who have collectively bargained an agreement and leave them to the benefit of their bargain, particularly where the state limits its deferential stance to those cases in which the protection of the arbitral process is guaranteed by contract. There is a reasonable presumption that employees who exercise their Section 7 rights to bargain collectively will obtain terms and conditions of employment in excess of the statutorily mandated "minimums" if their union fairly represents their interests at the bargaining table.

Importantly, however, the Commissioner's policy under Section 229 does not uniquely preclude the enforcement

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[7] States and the federal government may deem certain rights not subject to waiver, such as the right to choose one's bargaining representative, *Metropolitan Edison*, 460 U.S. at 705-706, *citing*, *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), the right under Title VII to be free from employment discrimination, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1981), and the right to certain mandated insurance benefits. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 758.

of the claims of "union workers" under "union contracts," notwithstanding Livadas' insistence to the contrary (See Pet. Br. 4-5). For example, the Section 201 and 203 claims of union members covered by collective bargaining agreements containing no arbitration clauses, such as "short form" contracts common in the construction industry, may be adjudicated by the Commissioner under this State policy (See Resp. Br. Opp. Cert. 4, n.4). Similarly, other claims that do not in any way involve interpretation or application of the collective bargaining agreement are entertained by California's Labor Commissioner, such as actions to recover wages due on a non-sufficient funds check, or actions for recovery of work tools of an employee wrongfully retained by the employer, or actions for damages for the employer's failure to release these tools (*Id.* at 4, n.5). Similarly, the Commissioner will entertain claims in which the statute does not require that the terms of a collective bargaining agreement be interpreted or applied, such as actions to recover mandatory minimum wages and enforcement actions to prohibit retaliation or discrimination in terms and conditons of employment (*Id.* at 4, n.7).

Conversely, there are instances in which California's non-enforcement policy equally would extend to employees who are covered by a collective bargaining agreement with an arbitration clause, but who nevertheless are without the protections afforded by Section 7 of the NLRA. Thus, the National Labor Relations Board has exercised its discretion under Section 14(c) of the NLRA, 29 U.S.C. § 164(c), to decline to exercise jurisdiction over industries, establishments, and enterprises that do not meets its jurisdictional standards. *See generally NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684 (1954). Most of these entities can be described as essentially local in nature. Moreover, the Board also refuses to assert jurisdiction over entire industries which, by no means, can be said to be purely local —the horse-racing and dog-racing industries. *See* National Labor Relations Board Rules and Regulations, as amended, § 103.3. *See also* Theophil C. Kammholz & Stanley R. Strauss, *Practice and Procedure Before the National Labor Relations Board*, § 3.02 (4th ed. 1987). As a result, individuals employed by such exempted entities can be said to have no enforceable Section 7 rights, but nevertheless they, too, could have claims that would be excepted from enforcement under Section 229 because their terms of employment are encompassed in collectively bargained agreements.

In short, California's statutory scheme is neither a discriminatory scheme based upon "union" membership, nor, paraphrasing Livadas, an interference with the assertion of the Section 7 right to have a bargaining representative who bargains collectively for an arbitration clause (Pet. Br. 16-17). Rather, it is merely the different treatment of employees who (1) are covered by collective bargaining agreements containing arbitration provisions and (2) whose claims cannot be resolved unless the Commissioner were to apply or interpret the agreement in violation of the State's policy. As explained above, this *different* treatment of differently situated individuals by California is not *discrimination* based upon the exercise of Section 7 rights and does not uniquely burden those federal rights. Here, as in *Fort Halifax, supra*, in which a broad contract exception to Maine's severance-payment statute was held not to target or uniquely burden parties to agreements bargained pursuant to Section 7, California's limited collective bargaining agreement exception is *not* a "union" contract exception. *Cf. American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965) (noting that, although right of employer to use the "lockout" weapon had an impact upon employees' latitude to strike and upon their stance in bargaining, such an *effect* was not an illegal *interference* with the employees' right under Section 7 to bargain collectively).

In addition to not discriminating against employees who exercise their Section 7 rights, Section 229 as inter-

preted does not conflict with federal law by "interfer[ing] with the exercise of these federally protected rights[.]" *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984) (holding state statute that accords with Congress' policies under federal labor law not to be pre-empted merely because it regulates conduct covered by Section 7). Thus, although Livadas attempts to drape herself in the mantle of *Nash v. Florida Indus. Comm.*, 389 U.S. 235, 237 (1967), Livadas' case is not analogous to Nash's case. Nash filed an unfair labor practice charge disputing the lawfulness of her termination under the NLRA and was denied unemployment compensation benefits because, under Florida law, employees involved in labor disputes were barred from collecting such benefits. *Id.* at 237. Accordingly, the immediate and direct result of having asserted her federally protected right to file an unfair labor practice charge was Nash's loss of a state benefit. The Court said: "like the coercive actions which employers and unions are forbidden to engage in, [Florida's actions] ha[d] a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." *Id.* at 239.

By contrast with Nash's plight, Livadas' right to bargain collectively plainly was not undermined by the Commissioner's policy. Rather, the sanctity of the bargain that had been struck on Livadas' behalf—as well as her rights and remedies negotiated thereunder——was observed to the letter. Indeed, although not shown in the record before the Court, Livadas' contractual remedies better effectuated her rights than would have the successful prosecution of her claim for a penalty of three days' wages. For, again, returning to the "terrain of this case," it appears that Ms. Livadas, with the assistance of the Union lawyers who have represented her in the courts below and now in this Court, simultaneously availed herself of the grievance and expedited arbitration procedures available under the collective bargaining agreement negotiated on her behalf. As a result of this process, the Arbitrator determined that Ms. Livadas not only was entitled to be reinstated to her position at Safeway without loss of seniority, but also that she was entitled to *full back-pay* from the date of her pre-termination suspension with interest, less minor deductions.[8] We have reprinted, in the Appendix hereto, the opinion of the Arbitrator predicated on the grievance asserted on behalf of Ms. Livadas, which we have also reprinted.[9]

When one eschews Livadas and her supporting *amici*'s "uncritical generalities" and "rhetorical phrases unnourished by the particularities of [the] specific situation" (Frankfurter dissent, *supra*) several propositions become clear. First, far from being disadvantaged because she was employed under a collective bargaining agreement, Ms. Livadas quite clearly obtained more relief than a similarly situated Californian would have obtained without such a contract. Indeed, had the Commissioner of Labor devoted his resources to Ms. Livadas' claim, it would be the non-represented Californian who would be disadvantaged by the inevitable delay caused by the Commissioner's expanded jurisdiction. Second, returned as she was to her job, essentially with full back-pay plus interest, and an arbitral pronouncement that her termination was unjustified, Ms. Livadas could not reasonably be left with the impression that the incidents of collective bargaining are a burden on one's legal rights or that any minor

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[8] The deductions were for interim earnings, and for an apparently unwarranted continuance necessitated by her union's failure to participate at an earlier scheduled arbitration hearing. (Appendix at 7a-8a).

[9] The relevance of the arbitration award is apparent in light of Ms. Livadas' broad claims of harm. Moreover, the relevance of the award is underscored when one notes that the back-pay remedy accorded Ms. Livadas apparently mooted any claim for penalty wages. This is because, as the Commissioner has noted in his brief on the merits, a defense to a penalty wage claim is the employee's ultimate reinstatement with full back pay (*See* Resp. Br. 4).

diminution in individual statutory "rights" is not offset by collective gains.[10]

Finally, and obviously, Livadas' case does not provide, as suggested by Judge Kozinski in his dissent and echoed in the Solicitor General's brief (S.G. Br. 9), California employers with a union-chilling tale of the grievous effects that befall union employees who are "abandoned" by the State Labor Commissioner and forced to use the remedies available under grievance and arbitration agreements. Indeed, when all is said and done, the actual facts of Livadas' case demonstrate the propriety of the policy choice articulated by Section 229 as interpreted. This policy allows the parties to collectively bargained contracts to choose the set of rights that best effectuate their collective goals. And, where the contract provides for arbitration, the State appropriately defers to this machinery, thus "allow[ing] the parties to resolve [their employment related] matters without the unsettling effect of State regulation." *Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991).

II. THIS CASE DOES NOT PRESENT A CLAIM COGNIZABLE UNDER 42 U.S.C. § 1983.

As we have shown, Section 229's collective bargaining exception does not, as interpreted, interfere with Livadas' Section 7 right to bargain collectively. Indeed, this "hands off" policy is in complete accord with federal labor policy. Accordingly, the Commissioner properly may decline to entertain claims like Livadas' without fear of being pre-empted by the NLRA. Nonetheless, even

[10] Thus, the dim picture painted by Ms. Livadas of the "ongoing choice [of] . . . whether to retain collective bargaining and grievance arbitration" in light of the "Commissioner's abandonment" of "already-unionized employees, like Livadas herself," is a disingenuous portrait at best (Pet. Br. 14). Left to the mechanisms of their collectively bargained contracts and the grievance machinery in place thereunder, it appears that employees like Livadas certainly gain more than Labor Code Sections 201 and 203 would afford them.

assuming that the Commissioner's policy presents a chain of circumstances that in some remote sense impinges upon the exercise of a Section 7 right, this is not the sort of harm that should be cognizable under 42 U.S.C. § 1983.

In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) ("*Golden State II*"), the only case in which this Court has considered a Section 1983 claim flowing from pre-empted State action,[11] the Court majority held that action taken by Los Angeles in contravention of the National Labor Relations Act, and thus pre-empted by that Act, could form the basis of an action by the aggrieved company against the City under 42 U.S.C. § 1983. In its prior opinion deciding the underlying pre-emption issue, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) ("*Golden State I*"), the Court held that Los Angeles had directly interfered with the Company's clear NLRA right to use its economic weapons during a strike by conditioning Golden State's license renewal on its settlement of the strike with its unionized employees. Accordingly, the City's actions were held pre-empted by federal labor law because they regulated conduct that Congress, in enacting the NLRA, intended to be free from all governmental interference. 475 U.S. at 614. Because the federal right was plain and unambiguous, expressing a Congressional mandate rather than a preference among a range of permissible policy choices, and because the City's action clearly interfered with that individual federal right, the Court majority in *Golden State II* declared that a suit under Section 1983 was not foreclosed. 493 U.S. at 106, 112-113.[12]

[11] Although pre-emption and Section 1983 coincided in another case, *Felder v. Casey*, 487 U.S. 131 (1988), that issue arose when a state's attempt to apply a state procedural rule to a Section 1983 claim was held pre-empted by Section 1983 itself.

[12] As we read the dissenting opinion in *Golden State II*, the Chief Justice and Justices O'Connor and Kennedy would hold that

Although observing that state interference with NLRA rights could form the basis of a Section 1983 action, the Court majority in *Golden State II* cautioned that "it would be obviously incorrect to assume a federal right of action pursuant to Section 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Id.* at 108. In like regard, here it would be inaccurate to conclude that the mere assertion of a federal right and an allegation of state interference, without more, entitles an individual to compel a state to defend a federal lawsuit brought under Section 1983. Rather, "the question still remains whether [the] claim . . . comes within the scope of the right that Congress intended to confer." *Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 433-34 (1987) (O'Connor, J., dissenting). For, while a right may, as a general proposition, be clear and articulable, we submit that the invocation of that clear right in a particular context may present a claim far too "vague and amorphous" to be enforceable. *Golden State II*, 493 U.S. at 106, *quoting, Wright v. Roanoke*, 479 U.S. at 432.

Moreover, an extra measure of caution is warranted in inferring Congressional intent to confer an actionable right on individuals against states when, as here, "the rights asserted impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on States." *Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981). Indeed, such prudence is particularly appropriate given that the core concern of pre-emption is "the federal structure of the Nation, rather than the securing of rights, privileges and immunities to individuals." *Golden State II*, 493 U.S. at 117 (Kennedy, J., dissenting). Thus, we submit that

federally pre-empted state action does not give rise to a Section 1983 cause of action. Applied here, that position would, of course, be dispositive, and the issue concerning the chimerical impact of California's action on NLRA rights would not need to be addressed.

more than theoretical injury must be asserted before concluding that putative harm to the Section 7 right to bargain collectively may be used as a rationale for imposing affirmative obligations on the Commissioner of Labor to broaden the class of claims within his jurisdiction.

If all that Section 1983 requires is that Livadas invoke her Section 7 right and assert an imaginable, albeit unlikely, harm to that right from a state's policy decision, Livadas would be correct and so would the courts below that Livadas has a cause of action under Section 1983. But under this Court's majority opinion in *Golden State II*, much more is required; it must be shown that an actual, demonstrable interference with Livadas' right to bargain collectively under Section 7 has occurred—a showing, as we have demonstrated, Livadas has not made.[13] *Cf. Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991) (finding demonstrable interference with Section 7 right).

Here, by focusing almost exclusively on the narrow issue of whether the right to bargain collectively was a right of the individual or only of the representative through whom this right is realized, the courts below failed to address the basic issue presented in this case—whether the interference alleged to flow from California's action was actually too "vague and amorphous" to create a right of action under Section 1983. *Golden State II*, 493 U.S. at 106. *See also, Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. at 432.

In sum, because there is no plausible nexus between the Commissioner's interpretation of Section 229—which resulted in the California Department of Labor's decision not to proceed with Livadas' penalty claim—and Livadas'

[13] This proposition accords with California's reasoning in its brief on the merits that, absent a clearly defined federal obligation, a state official's exercise of his discretionary authority to comply with state law should not be subject to federal review and revision under Section 1983 (See Resp. Br. 44-49).

allegation of interference with her federal right to bargain collectively, we submit that a cause of action under Section 1983 simply does not lie.[14]

III. THIS CASE SHOULD NOT BE THE PREDICATE FOR A NEW RULE THAT UPSETS STATUTORY DEFERENCE TO COLLECTIVELY BARGAINED AGREEMENTS.

Many states have laws that contain exceptions for employees covered by collective bargaining agreements. Indeed, these laws have provided a backdrop against which unions and employers have bargained contracts for almost sixty years. (See, e.g., Employer's Group Br. 28-30, B-1—B-6). As noted earlier, these laws generally presume that employees who exercise their Section 7 rights will be fairly represented at the bargaining table by unions that will obtain for the represented employees terms and conditions in excess of statutorily mandated minimums, and that these terms will be secured through grievance and arbitration agreements. This is the hallmark of the free collective bargaining process established by the NLRA and unique among industrialized countries.

This system and the delicate balance that collective bargaining represents may be jeopardized by a sweeping judicial pronouncement that states may no longer presume that unionized employees will win more at the bargaining table than non-union employees, or that the bargains they have struck will be secured by the grievance and arbitration process. Parties to such agreements may have imposed upon them contract terms that may have been expressly negotiated away for other more valuable rights; or, as was stated by the Ninth Circuit in *Barnes v. Stone Container Corp.*, *supra*, terms that have the "untoward effect of . . . alter[ing] incentives to negotiate." 942 F.2d at 693.

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[14] The U.S. Chamber and the NAM obviously believe that the Ninth Circuit Court of Appeals arrived at the right outcome in this case, even as it did so upon premises with which they would not necessarily concur.

Indeed, the concept of meaningful collective bargaining itself may be jeopardized. The National Labor Relations Board has observed, "[a]ll agree that bargaining can occur within a corridor of bargaining subjects, but one's view of whether bargaining is meaningful under the National Labor Relations Act turns, in part at least, on the narowness of the corridor." *Res Care, Inc.*, 280 NLRB 670, 674 (1986). Further, the Board has stated that the key to the bargaining process is "the ability to engage in the necessary 'give and take' which is a central requirement of good-faith bargaining and which makes bargaining meaningful." *Id.* It is the parties at the bargaining table who alone determine whether an agreement will be reached.

If either unions or employers perceive themselves as better able to secure gains by their conduct away from the bargaining table, whether by way of their political power or by their litigation resources, the concept of free collective bargaining upon which the National Labor Relations Act is based will be substantially eroded. This is at least, in part, the lesson of *Golden State I*. There, the union's pressure upon the City Council at public meetings led the Council to condition renewal of the struck employer's license on a settlement with the union. 475 U.S. at 610-11. But, this use of political pressure to achieve leverage not available at the bargaining table was as inconsistent with the fundamental principles of free collective bargaining—and as integral to this Court's decision condemning the City's action—as the City's interference with the employer's NLRA right to withstand a strike. So too here, the potential for judicially imposed or legislated terms which narrow the "corridor" of bargaining and limit the meaningful give and take which takes place during this exchange must not be disregarded in the ultimate disposition of this case.

The liberty of states to regulate certain minimum employment standards ought not be transformed into a man-

date that states must regulate all employment relationships or none. The freedom to bargain collectively surely would be abridged if states were required to legislate a "minimum terms" contract, the contours of which would be formed by the political power of unions or employers, instead of by the respective economic power of the parties at the bargaining table, as intended by the NLRA.

It is precisely because the NLRA seeks to further "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract[]" (*H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970)) that deference to collectively bargained agreements should not be rejected based upon an attenuated claim of harm of the sort asserted by Livadas.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce and the National Association of Manufacturers urge this Court to uphold the Ninth Circuit's Order to the District Court to enter judgment in favor of the California Labor Commissioner.

Respectfully submitted,

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APPENDIX

APPENDIX

ABBREVIATED OPINION & DECISION OF BARBARA CHVANY ARBITRATOR

San Francisco, California
July 11, 1990

IN THE MATTER OF AN ARBITRATION

between

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 373,
Complainant

and

SAFEWAY STORES, INC.,
Respondent

RE: THE DISCHARGE OF KAREN LIVADAS

APPEARANCES

On Behalf of the Union:

Barry S. Jellison, Esq.
DAVIS, COWELL & BOWE
100 Van Ness Avenue, 20th Floor
San Francisco, CA 94102-5209

On Behalf of the Employer:

Mr. John J. Baruch
Labor Relations Associate
FOOD EMPLOYEES COUNCIL, INC.
2000 Crow Canyon Place, Suite 200
San Ramon, CA 94583

INTRODUCTION

This dispute arises under the Collective Bargaining Agreement between the above-captioned Parties (JX 1). Pursuant to the expedited arbitration procedures of the Agreement, the undersigned Arbitrator was mutually selected and an arbitration hearing was conducted on April 6, and May 1, 1990 in Vallejo, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as TR ——). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly in arbitration (TR 5). Post-hearing briefs were filed by the Parties, and the matter was deemed submitted for decision on June 15, 1990. This constitutes an abbreviated Opinion & Decision. Either Party may request a full Opinion (TR 282).

The Grievant, Karen Livadas, was hired by the Company April 16, 1973. She was suspended on December 27, 1989 and was discharged effective January 2, 1990 (TR 5-6). As the time, she was a full-time journeyman clerk at Store No. 989 in Vallejo, California (TR 6).

ISSUE

Whether the Grievant, Karen Livadas, was discharged for just cause; and, if not, what shall be the remedy? (TR 2)

REMEDY REQUESTED

The Union requests the Grievant's reinstatement with full seniority, backpay and all contractual benefits. The Union contends that backpay should not be tolled, as the Company requests, and that the Company should be required to pay its share of the Arbitrator's cancellation fee for March 1, 1990 (TR 2; UN BF 25-26).

The Company seeks denial of the grievance in its entirety (TR 2; CO BF 37). In the event a remedy is found to be owing, the Company requests that any backpay be

tolled from and after March 1, 1990, because the Union refused to proceed to hearing on that scheduled date (TR 3). The Company also takes the position that the Union should be responsible for 100% of the Arbitrator's cancellation fee for March 1, 1990.

ABBREVIATED OPINION

The discharge of the Grievant is based upon two separate charges: (a) an alleged racial slur toward a customer; and (b) alleged misconduct involving the use of a coupon. Both incidents occurred in December 1989. Upon a thorough review of the record, it is found that the Employer has failed to sustain its burden of proof as to both charges, for the reasons summarized below.

The first charge is based upon a customer complaint by Richard Wolgamott, who testified the Grievant called his wife a Filipino bitch in his presence, while he and his wife were being checked out by the Grievant at the Store. The Grievant denies making this statement or any other racial slur to either Wolgamott or his wife, and the Grievant claims that Wolgamott's wife was not even with him at the time. Therefore, credibility is crucial to an assessment of this charge.

The allegation is a serious one. A deliberate racial epithet directed towards a customer, if proven, constitutes serious misconduct that may warrant summary termination under the Collective Bargaining Agreement. Such intentional abusive conduct is distinguishable from a mere failure to perform work as required. Certainly, no customer should be required to suffer racial abuse from a clerk, and an employer has a legitimate interest in prohibiting such offensive behavior towards customers. But, the Company bears the burden of establishing such a serious charge by reliable evidence.

Wolgamott's credibility is essential to the Company's case, because his testimony stands alone to support the

charge. Wolgamott's wife, the alleged target of the racial slur, did not testify.[1] As outlined below, there are several reasons to question the reliability of Wolgamott's account.

Wolgamott's credibility is cast into doubt by several elements in the record: internal contradictions in his own testimony; other evidence which contradicts his testimony on a number of significant points; and evidence that he sought to gain monetarily from asserting this complaint. On several points, he was shown to exaggerate and overdramatize, and it is difficult to determine where the simple truth ends and the embroidery begins.

Concerns about Wolgamott's candor are amplified when his testimony is compared with the other testimony and evidence in the record. There are unresolved doubts as to whether Wolgamott was accompanied by his wife when the incident occurred. These doubts are not based solely upon the Grievant's testimony. There are also unresolved questions as to what Wolgamott originally reported to the Company, and whether his initial reports were consistent with his account at the hearing. There is unrebutted testimony that, at the Board of Adjustment, the Company alleged the Grievant made a completely different racial comment, to Wolgamott, than the one described at the hearing. This and other evidence suggests the original complaint was different from his later testimony. These questions and inconsistencies remain unexplained. For all these reasons, the unsubstantiated testimony of Wolgomott is found to be insufficient to support this charge.

The Arbitrator suspects that some sort of exchange occurred between Wolgamott and the Grievant that caused him to lodge a complaint against her. But, whether this involved some remark with racial content, or otherwise was due to improper conduct by the Grievant, is uncer-

[1] No explanation is offered as to why she did not appear notwithstanding the crucial credibility issues involved in this case.

tain.[2] In this proceeding, the decision may not be based upon suspicion or conjecture. The Arbitrator is bound by the just cause requirement of the Agreement to apply accepted standards of proof, and they have not been met on this charge.

The Arbitrator has grave concerns that the Grievant may not have gotten the message inherent in her lengthy suspension in 1986 for an incident involving a racial remark, if, indeed, the instant matter involves a recurrence of such conduct. However, the fact that the Grievant was disciplined in the past does not establish that she, in fact, engaged in similar conduct in December, 1989. On the other hand, the Arbitrator has equally grave concerns that the Grievant may have been targeted for disciplinary action due to past events, and may be receiving less than a fair shake from her superiors in the Store (see, *e.g.*, TR 161).

The latter concern is underscored by the fact that serious breaches of the Grievant's due process rights occurred in this case. For example, although the incident underlying this charge occurred sometime in early December, the matter was first raised with the Grievant on December 27, 1989. The Company terminated the investigatory meeting on that date when the Grievant requested Union representation, and she was never provided an opportunity to present her version of events prior to her termination. The Grievant has a right to request Union representation, and such a request does not relieve the Employer of its obligation to conduct a full and fair investigation.

In addition, the Employer terminated the Grievant prior to receiving a written statement from the complaining customer, and apparently before the factual basis for the charges had been identified with any specificity. It is unclear when the Employer finally received specific in-

[2] There is evidence that requiring identification and/or approval of an out-of-state check was involved.

formation from Wolgamott about what the Grievant had said or done to offend him. Even his written complaint, finally submitted approximately a month after the fact, does not identify the alleged racial slur made by the Grievant (CX 7). As noted above, the specific allegation made by the Company at the Board of Adjustment differed substantially from the testimony of the complaining customer at the hearing. All of these circumstances demonstrate a breakdown of due process in the handling of the Grievant's case.

With respect to the charge involving the coupon, the record fails to show fraudulent or intentional misconduct on the Grievant's part. The record supports a finding that the Grievant combined in a purchase with another employee, Gary Massucco, and used her employee coupon for that combined total purchase.[3] There is no evidentiary support for the Company's claim that sharing in the purchase of the basketball cards was something fabricated by the Grievant after-the-fact in an attempt to cover-up misconduct. The Company did not show that the merchandise purchased was clearly excluded from the coupon discount.

The Grievant testified she believed Massucco did not get a coupon, and her testimony in this regard is consistent with what she told Annette Phillips, the checker who handled the transaction, at the time the transaction took place. There was no showing that she knew Massucco had received or used another coupon as of the date in question. As an employee, Massucco was also entitled to an identical coupon.

The Grievant, Annette Phillips and Gary Massucco all testified they did not think they were doing anything wrong by engaging in this transaction. The Company accepted Phillips' assertions in this regard, but rejected

[3] The coupon was of a type issued by the company to all employees in Northern California.

the Grievant's and Massucco's.[4] If this transaction was so obviously improper, as the Company claims, it is unclear why the Company excused Phillips from any responsibility, since the record shows she was fully aware of the circumstances involved in the transaction. She was not disciplined. While it would have been prudent for the Grievant to have checked with the store Manager in advance of this transaction to insure that it would be acceptable, that failure in judgment does not amount to improper conduct justifying summary termination. No intent to deceive or defraud the Company was shown on the Grievant's part. Given this fact, and the fact that Phillips was not disciplined at all, grounds for lesser discipline have not been established.

With regard to the question of the cancelled hearing date of March 1, 1990, the Union now argues that delays due to continuances are routine and that such postponements do not result in tolling of back pay awards. The Union also contends the continuance from March 1 to April 6 was justified due to the Company's refusal to provide certain information, in violation of the grievance procedure.

What the Union's argument ignores is that the continuance ordered by the Arbitrator was necessitated by the Union's refusal to participate in the hearing on March 1, 1990, even for the purpose of presenting a motion for a continuance. In fact, at no time did the Union present or support such a motion. For this reason, the Arbitrator has no basis now to find the delay caused by the Union's refusal to participate on March 1, 1990 was necessary or appropriate. Under the circumstances, it is found that the backpay remedy should be tolled for the period of the delay, and that the Union is responsible for 100% of the Arbitrator's cancellation fee for March 1, 1990.

[4] Gary Massuoco was terminated based, in part, on this incident. His discharge was upheld by another Arbitrator on other grounds.

Accordingly, the following Decision is made:

DECISION

1. The discharge of Karen Livadas was not for just cause.

2. As a remedy, Ms. Livadas shall forthwith be reinstated to her former position, without loss of seniority. She shall receive full backpay from the date of her suspension until the date of her reinstatement, minus the period March 1, 1990 to April 6, 1990 and any earnings from other employment. Interest pursuant to Section 18.7 shall be paid on the backpay award.

Ms. Livadas' contractual benefits for the period from her suspension to her reinstatement shall be restored in the amounts and manner prescribed by the Collective Bargaining Agreement.

3. The Arbitrator retains jurisdiction over the implementation of the remedy herein, in the event a dispute arises.

4. Pursuant ot Section 18.5, all jointly incurred arbitration expenses involved in this case shall be borne by the Company, with the exception that the Union shall be responsible for 100% of the Arbitrator's cancellation fee for March 1, 1990.

/s/ Barbara Chvany
Arbitrator

UNITED FOOD & COMMERCIAL
WORKERS UNION—LOCAL 373

Chartered by the United Food & Commercial Workers International Union, AFL-CIO & CLC

December 29, 1989

Mr. William Daly
Contract Administrator
Safeway Stores, Inc.
47320 Kato Road
Fremont, CA 94538-7334

Re: Karen Livadas
Suspension and/or Termination

Dear Mr. Daly:

On behalf of the above noted member we protest the suspension imposed with no written documentation and little to no verbal reason given to either her or this Union.

We have been attempting for three days to determine the duration of Ms. Livadas suspension, the basis for that suspension and if, in fact, it is a termination rather than a suspension.

We demand that she be immediately returned to work with full payment of all wages and benefits she lost.

If we are in disagreement please refer to Section 18.2 of the Agreement and be advised we are prepared to meet within the time limits specified therein.

This Local Union reserves the right to set forth any additional facts and Contract provisions we may determine to be necessary or appropriate to the final disposition of this grievance.

Very truly yours,

/s/ Doris E. Lowe
Secretary-Treasurer

DEL:sc
opeu 29
afl-cio

cc: PETE ROCKWELL
KAREN LIVADAS